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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1085

TELEPHONE ANSWERING SERVICE CO., INC., ETC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

In its Brief in Opposition to the Petition for a Writ of Certiorari Respondent asserts (Resp. Br., p. 6) that the decision of the Court of Appeals for the Fourth Circuit below, in affirming the Tax Court, does not conflict with that of the Second Circuit Court of Appeals in *Commissioner v. Berghash, et al.*, 361 F.2d 257 (C.C.A. 2, 1966), or with that of the Ninth Circuit Court of Appeals in *Breech, et al. v. United States*, 439 F.2d 409 (C.C.A. 9, 1971), because "those cases involved transfers of assets to corporations having such new and different

stock ownership that there was no continuity of control, as defined by Section 368(c) of the Code".

Respondent confuses the issue and misses the point entirely. Although Section 368(c) defines "control" for purposes of several Parts of Subchapter C, it has applicability in the context of this case *only* with respect to the issue of whether or not a corporate reorganization within the meaning of Section 368(a)(1)(D) occurred — *an issue which the Courts below expressly chose not to decide.* Nowhere in Sections 331 or 337 is the term "control" used by Congress, and no authority whatsoever has been cited for its relevance to the issue of whether or not a "complete liquidation" has occurred within the meaning of those Sections.

In like manner, in *Commissioner v. Berghash, et al.,* and "without the citation of any authority", the Government had claimed "that section 337 can apply only where a bona fide termination of the business of the liquidating corporation has occurred". (43 T.C. at 758). The Tax Court quite properly found no such requirement and, following its reasoning in *Joseph C. Gallagher,* 39 T.C. 144, that if a literal liquidation cannot be brought within the reorganization sections of the Code it must be recognized for what it is, concluded (43 T.C. at 759):

> "We are unable to find any authority or any indication from the legislative history of section 337 that would require us to disregard the actual liquidation and dissolution of Delavan-Bailey."

In affirming, the Second Circuit Court of Appeals took special pains to comment upon the Tax Court's rejection of the Government's contention that if the business of the liquidated corporation is continued by a new corporation there is no "complete liquidation". Said the Court (361 F.2d at 260):

> "We are in complete agreement with the Tax Court's resolution of this issue; its interpretation reflects the normal meaning of the words 'complete liquidation' in Sections 331 and 337. To adopt the Commissioner's contention would do violence to the plain meaning of these statutes."

It is quite true, of course, that there are factual differences between *Berghash* and the instant case. The primary difference, however, is that in *Berghash* there was a substantial change in stock ownership but retention of all operating assets in corporate solution, whereas in the instant case the liquidation followed a sale of the taxpayer's largest subsidiary to an unrelated party, but the shifts in stock ownership were less significant. The point, however, is that neither the Respondent nor either of the Courts below has suggested even a single reason, much less any supporting authority, for concluding that *irrespective of whether or not a corporate reorganization has taken place,* an admitted liquidation may be a "complete liquidation" governed by *Berghash* only if a substantial change in stock ownership has occurred. The above quoted language from the decisions of both the Tax Court and the Second Circuit Court of Appeals indicates quite clearly that no such limitation was intended.

In *Breech, et al. v. United States, supra,* the Court of Appeals for the Ninth Circuit not only chose to follow both the reasoning and the result reached by the Second Circuit in the *Berghash* case, but followed it in circumstances where but for the fact that the attribution rules of Section 318 of the Internal Revenue Code do not apply for purposes of Section 368(c), the continuity of stock ownership as between the liquidating corporation and the corporation which purchased its assets would have been sufficient to have characterized the transaction as a Section 368(a)(1)(D) reorganization. After holding that the Government's argument for a "D" reorganization failed because such attribution cannot be made, the Court turned to its alternative

argument that a "complete liquidation" had not taken place within the meaning of Sections 331 and 337. On this issue the Court squarely adopted the holding of the Second Circuit in *Berghash* without even suggesting, as Respondent does in the instant case, that the reasoning of the Court in *Berghash* should not apply where there is a continuity of interest in the same stockholders. There is no rational basis for a conclusion that *absent compliance with the requirements for a reorganization* an admitted liquidation is any less "complete" where a continuing interest is retained through direct ownership, as in the present case, rather than indirectly, as in *Breech*.

CONCLUSION

Neither *Commissioner v. Berghash, et al.*, 361 F.2d 257 (C.C.A. 2, 1966), nor *Breech, et al. v. United States*, 439 F.2d 409 (C.C.A. 9, 1971), may be construed as narrowly as Respondent or the Courts below have suggested. Both decisions stand squarely for the proposition that a liquidation must be recognized as "complete" within Sections 331 and 337 of the Internal Revenue Code *unless the transaction can be characterized as a corporate reorganization within Section 368(a)(1)*. The decision of the Court of Appeals for the Fourth Circuit in this case that an admitted liquidation may not be "complete" even though it is not a reorganization within Section 368(a)(1) is squarely in conflict with these decisions of the Courts of Appeals for the Second and Ninth Circuits.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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